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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 192

WILLIAM E. EVANS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA.

PETITION FOR WRIT OF CETIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

C. Y. Brown,
John F. Williams,
Counsel for Petitioner.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully presents:

I.

Summary Statement of Matter Involved.

William E. Evans, the petitioner, was tried July 28, and 29, 1942, in the Court of Sessions for Spartanburg County, South Carolina, under an indictment charging him, under Sec. 1112, of the 1942 Code of Laws of South Carolina, with

aiding in producing an abortion. He was found guilty and sentenced to 12 years imprisonment.

The defendant duly appealed to the Supreme Court of South Carolina, which affirmed the judgment and sentence on March 29, 1943. A petition for re-hearing was duly filed (R. 184) and the court (R. 189) on May 11, disposed of the petition by overruling it, as is often done in such cases, without further discussion.

It is this judgment which is now sought to be reviewed.

During the course of the trial the Solicitor offered as a witness against petitioner Sheriff Sam Henry, of Spartanburg, whose testimony was undoubtedly intended to corroborate the testimony of the woman who claimed to have committed the abortion upon the advice of petitioner. The Sheriff having stated that as a result of his investigation he arrested the petitioner and that he and other officers arranged a meeting in jail between him and his codefendant in order to get whatever information he might from them, when he began to detail the conversation between the three, the testimony was objected to on the grounds stated in the record (R. 54). The Solicitor urged the testimony as competent and the presiding judge admitted it as competent, upon the issue of the guilt or innocence of the petitioner. This testimony of the chief law enforcing officer of the County detailed the accusations made by petitioner's codefendant substantially as she had testified during the day (R. 4). However, he went slightly further than she did, in that he testified that petitioner assumed the charge to be true to ask her questions, though he did say on his cross-examination that petitioner denied any guilt. The admission of the testimony is made the basis of Exception 1 to the State Supreme Court (R. 166).

It will be noted, however, that where a person is charged with felony, as petitioner was, the State Supreme Court

itself will consider any error in the admission of testimony that in any manner tends to incriminate the accused, even though it was not objected to by defendant's counsel. And, too, it will be noted that Henrietta Henderson was not the first one to mention the name of petitioner (R. 163), and she had not yet been arrested. When she was arrested and placed in jail, the Sheriff arrested Evans and placed him in jail with the prearranged meeting of the two, in an effort to get evidence against Evans. When Henrietta Henderson was out on bond she went to the office of one of Evans' attorneys, Mr. Galloway, and there, according to the stenographer who took down her statement, voluntarily exonerated Evans. She was rearrested, within four days, and held until the trial, at which time she again accused Evans. It developed in the course of the trial that this was the first crime of this character that Henrietta had ever committed; that it was the first time she had ever seen Evans or the girl; that Evans took the girl to her house, in the country, and left her there without having even spoken to her about it, and that the girl sat there for some two to four hours until Evans returned, and that he came in and introduced himself, and, according to the husband of Henrietta, shook her hand. This being about the state of the direct testimony thus far produced against petitioner, the State rested its case, and defendant put up some witnesses.

It was now 5:55 P. M. The Court had previously announced at the opening, that the hours of adjournment for the day would be 6 P. M. Mr. Brown, of counsel for the petitioner, just five minutes before the previously announced time for adjournment, moved the court to suspend until next morning (R. 85), saying "* * * we made our arrangements to work accordingly * * *". The

following is what took place between counsel and the Court:

> "The Court: Is there nothing else you can do, Gentlemen, between now and seven o'clock? Let the Jury go in the room there. (Jury retires) I am not going to lose this hour if I can help it; if you have anybody else, we will go on. How about the defendant—are you going to put him up?
>
> "Mr. Brown: After the witness we will have, here is what we had in mind. We have eliminated a lot * * *
>
> "The Court: Put the defendant up—you've got an hour for that. Bring the Jury back (Jury returns). Proceed, Gentlemen:
>
> "W. E. Evans, a witness for the defense, duly sworn, testifies as follows:"

This ruling of the Presiding Judge constitutes the basis of Exception 2 to the State Supreme Court (R. 167).

The two questions presented by the Exceptions to the State Supreme Court were, substantially:

(1) Did the Presiding Judge err in admitting the testimony of Sheriff Sam Henry?

(2) Did the Presiding Judge err in ordering the defendant to take the stand, in response to a motion made by defendant's counsel to suspend court five minutes before the time for adjournment, without allowing defendant's counsel to state the grounds of his motion, and without allowing petitioner the benefit of the advice of counsel as to whether he should take the stand at that time, or even at all. And, as the record clearly shows, the Presiding Judge refused to hear counsel state why he had eliminated features of his former plan and decided to work on another arrangement, which arrangement the court refused to allow petitioner's counsel to state, after counsel had announced to the court that he had been working according to that plan. The

Court's attention is respectfully called to the record beginning on page 54, where it is clearly shown that neither the Solicitor nor the Presiding Judge allowed petitioner's counsel to fully state his position against the admission of the testimony of Sheriff Henry. It will be noted that at f. 218, on page 55, the Solicitor interrupted the court to ask a question; and while the record does not show whether the jury had retired at the time or not, yet at f. 214 the record does show that the court interrupted Mr. Brown before he could state his position, to ask the Sheriff if a warrant had been sworn out for the defendant at the time of the three-cornered conversation in the jail. Mr. Brown immediately cited the case of the *State* v. *Hester* (R. 216), and the Solicitor, without waiting for the court to rule, continued asking the Sheriff about the conversation. Mr. Brown again objected (R. 218). At R. 224, notwithtsanding the fact that Mr. Brown had stated to the court that the case of the *State* v. *Hester* held the testimony inadmissible (and the State Supreme Court so held) the Presiding Judge never one time asked to see the case, nor ruled in accordance with its holding. At R. 224, Mr. Brown again started to tell what "We think". The Court abruptly cut him off after the two words "We think" and announced that he was satisfied the testimony was competent and ordered the jury brought back into the court room, and proceeded with the testimony of Sheriff Henry. At R. 229, when Mr. Brown started to announce he was reserving his exception, the Solicitor cut him off with a question to the Sheriff, without letting him complete his statement to the court.

Upon the rendition of the opinion of the Supreme Court, affirming the conviction, petitioner caused to be filed, within due time, a petition for re-hearing (R. 184). In this petition, these issues were specifically brought again to the attention of the State Supreme Court, as was the additional issue that the opinion of the Court would deny petitioner

trial by a jury, if that Court might decide that there was sufficient evidence to convict, after eliminating the objectionable testimony of Sheriff Henry. And specifically, petitioner, after mentioning the fact that Sheriff Henry's testimony must have had some influence upon the jury, asked if that, and forcing the defendant to the stand, constituted due process. Particularly did the petition for rehearing refer again to the argument and the authorities cited in petitioner's printed brief amongst which were the State and Federal constitutional guaranties, that in the trial of criminal cases the defendant shall be fully heard in his defense by himself, or by his counsel, or by both, and shall not be a witness against himself. *Sec. 17, Art. 1, Constitution S. C., Sec. 18, Art. 1, Constitution S. C., Amendments 5 and 6 U. S. Constitution.*

The State Supreme Court did consider these constitutional guaranties in is original opinion; but did not discuss them at any length, going no further than to say that the Presiding Judge's action was indicative of desire to progress with the trial and not of any intention to force the defendant to take the stand, in violation of his constitutional right.

Hence, petitioner, submits that the opinion of the State Supreme Court, not only decides a Federal question of substance in a manner contrary to the adjudications of the Supreme Court of the United States; but that it decided these issues, with respect to the testimony of Sheriff Henry and the order of the Judge to the defendant to take the stand and testify, contrary to the previous holdings of the State Supreme Court, upon the same questions, and particularly in that testimony obtained in such a way has been held by the adjudicated cases to be prejudicial, and to warrant a new trial without regard to consideration of the weight or effect thereof, as we shall show hereinbelow. And, hence, a third question arises, namely: Did the action of the trial

court and the State Supreme Court violate petitioner's due process as guaranteed to him by the 14th Amendment to the United States Constitution and the law of the land, including the decisions of the State Supreme Court and the constitutional and statutory laws of this State, which will be specifically referred to hereinafter.

Petitioner sought the consent of the State Supreme Court twice to make a motion for a new trial on after-discovered evidence, and was both times turned down. Those motions were made upon affidavits setting forth the proposed after-discovered evidence; when both motions were turned down. Those proceedings are not incorporated in this record for the reason that they would throw no light on the issues now involved. Petitioner also made a motion before the State Supreme Court for bail, pending the application for review by the United States Supreme Court. That application was declined for the time being. See order (R. 191).

II.

Jurisdiction.

The basis upon which it is contended by petitioner that this Honorable Court has jurisdiction to review the judgment of the Supreme Court of South Carolina in this cause, is Sec. 237-B of the Judicial Code, as amended, U. S. C. A., title 28, Sec. 344-B, for that petitioner, by the said judgment, has been denied due process of law and the equal protection of the laws in violation of the 14th Amendment of the Constitution of the United States; in that the Supreme Court of this State has decided Federal questions of substance and State questions vital to the defense of petitioner, and has decided all such questions adversely to the former adjudications of the State Court, and contrary to the conclusions of law announced in the opinions of the Supreme Court of the United States.

III.

Question Presented.

Whether under the undisputed facts and the law applicable thereto, petitioner has been denied due process of law and the equal protection of the laws under said 14th Amendment, by the action of the Supreme Court of South Carolina on appeal from the Sessions Court of Spartanburg County, South Carolina, affirmed by the State Supreme Court, in the following particulars:

(a) Did the Presiding Judge err in admitting the testimony of Sheriff Sam Henry?

(b) Did the Presiding Judge err in ordering the defendant to take the stand in response to a motion made by defendant's counsel to suspend court five minutes before the time for adjournment, without allowing defendant's counsel to state the ground of his motion, and without allowing the benefit of a conference between petitioner, counsel and defense witnesses, and without allowing petitioner's counsel to explain to the court what his plan or arrangement, for conducting the defense, was?

(c) Did the Supreme Court err, and thereby deny petitioner due process under Sec. 14 of the U. S. Constitution, and the equal protection of the laws under said section, in affirming these rulings of the trial court and in holding itself that there was no prejudicial error committed, and that the facts in the case, after eliminating the objectionable testimony, were sufficient to convict the defendant before any intelligent and honest jury; or did the opinion of the Supreme Court deny to him a trial by jury by substituting its own judgment for that of the jury, as provided by the Constitution of the United States and the State of

South Carolina, to be referred to more particularly hereinbelow?

IV.

The Result of the Irregularities of the Trial Court.

The Presiding Judge, according to the State Supreme Court, erred in admitting the testimony of the Sheriff, which the prosecuting attorney, the Sheriff himself, and the Presiding Judge thought competent as tending to show the guilt of the accused. That court said that the Presiding Judge erred for two reasons. There is still another reason why he erred, as we will show later. The testimony was corroborative of that of Henrietta Henderson and gave the bankground of the Sheriff's official approval of the charge she made against him in the presence of the Sheriff and the other officers, and tended generally to bolster up her claim. This testimony was exclusively for the jury, and the Presiding Judge could take no part in weighing it, either for or against the accused. But the Sheriff thought it was against the accused. The prosecuting attorney thought it was against him, and the Presiding Judge let the testimony in because he thought it was relevant. During the same day, and just five minutes before six P. M., the Presiding Judge ordered the defendant to take the stand, and he testified for an hour and continued into the next day with his testimony. An examination of the manner of cross-examination by the Solicitor will demonstrate that the Solicitor was not only endeavoring to elicit truth from accused; but was making specific charges against him, of insincerity, equivocation, deceptive tactics and even crime itself, holding him up to the ridicule of the trial jury and the audience. A reading of the cross-examination, beginning at f. 446, will show that the accused was charged with providing a cot for immoral uses of himself; that the accused went to the girl's house more than once, though he said he did not (f. 452); that she

called him more than once, though he said she did not (f. 456); that the accused was derelict in not telling her father as she had been sleeping in "your bed" (f. 459); that he had been to Charlotte, and that he had been to Augusta and stopped at a tourist camp (ff. 459-460), and that he had gone under the "pretense" of having some records adjusted, or something fixed; that he had always made it a point to go to her home when her father was away (f. 460); that he was not satisfied with damning her, causing her death, and now wanted to damn her character (f. 463); that he is willing to go to that extent in order to save his own hide; that he had gone to the extent of doctoring his own records since yesterday. You have gone and fixed up this receipt book (f. 467); that Henrietta Henderson had told him face to face in the jail that he sat on the couch while she carried the girl into the room (f. 484).

> "Q. You asked her a question; they were right when they swore that—did you not ask her, 'taking for granted it is true'" (R. 485).
>
> "Q. What question did you ask her?
>
> "A. I asked her 'To you and your God, you have never saw me before.'
>
> "Q. What you doing calling in God on that?
>
> "A. I knew I had not been there.
>
> "Q. You heard the Sheriff testify, and you heard the woman testify that you said, I did not give you any money, did I? The girl, the woman said, give me $10.00 and told me you give it to her and promised me $5.00 more.—you asked her the question.
>
> "A. She was under pressure" (R. 487).

At this juncture counsel for the accused asked the court to let him finish his answer, to which the court said counsel had the right to re-direct him after the Solicitor got through, saying if he was cut off Mr. Brown could put him on (R. 489).

"Q. How did you feel when you shook hands with Mrs. Henderson?

"A. I did not shake hands with her" (R. 495).

The purpose of this question could not have been for anything but to discredit the defendant for having shaken hands with his co-defendant, a negro woman.

Then again: "Q. Mrs. Salem was carried to the hospital on the day you were aiding and abetting in this abortion?

"Q. * * * You are willing to swear to anything to get out of the trouble you are in; there were three of you on the ambulance when you went over there and got her—why did you not leave one of them at the mortuary and go to the hospital? (R. 511).

"Q. You said he said he was going to kill you?

"The Court: I think he has taken time to answer.

"Mr. Brown: He is trying his best to answer; and the Solicitor is preventing him, asking another question in the midst of his answer" (R. 515).

Then after the accused had stated to the Solicitor that he was an educated man and the accused was not, and the Solicitor had stated to him that being uneducated did not keep him from telling the truth, and the accused stated that on cross-examination he could not answer as fast as if he was educated, the Solicitor asked him:

"Q. Do you want to rest awhile? (R. 519)

"Q. Your idea of getting the truth was sending her to your lawyer and getting her to change her story—June 23rd was the day they watched you like a hawk (R. 520).

"Q. We catch you in something and then you squirm into something else (R. 527).

"Q. Again, you are willing to swear anything to get out, are you not? (R. 530)

"Q. Why did you swear to something that was false? (R. 537)

"Q. * * * why did you put that over on this Court in order to get bond—just exactly the way you were getting these poor ignorant negroes to change their statements" (R. 539).

Again Mr. Galloway interrupted to say to the Court that the Solicitor is making a statement, to which the Court replied: "I think it was a question: Looking right at him." Again the Solicitor said:

"Q. Why did you put that over on this Court, just exactly the way you were getting these poor ignorant negroes to change their statements, wasn't it? (R. 540)

"Q. On the 22nd of June, the day before you laid this plan, Mrs. Dixon met her," etc. (R. 547).

V.

Reasons for the Allowance of the Writ.

The irregularities in the trial of petitioner clearly denied him a fair and impartial trial. The testimony of Sheriff Henry was so interwoven with that of Henrietta Henderson and the prosecuting attorney, in cross-examining the defendant, used the testimony of Henrietta Henderson, corroborated by Sheriff Henry, to argue and contradict the defendant with. The two were so interwoven that when the Judge admitted it, it became impossible for the jury to separate what Sheriff Henry had sworn from what Henrietta Henderson had sworn; but since the Sheriff and his officers furnished a background for Henrietta Henderson's testimony, it had the effect of strengthening hers, and when the witnesses for the accused in any way contradicted the testimony of Henrietta Henderson, it had the effect of contradicting the testimony of Sheriff Henry, for the Judge had allowed it for the consideration of the jury. The Supreme Court said this testimony was not proper; but the State Supreme Court reasoned that since Sheriff Henry was the ninth witness to be placed on the stand, inferen-

tially, the strength of it was ninth from the testimony of Henrietta Henderson. Whether it was the eighth or ninth witness, or possessed eighth or ninth degree strength, it was some testimony that the jury were bound, under their oaths, to consider, after the judge had allowed it to come before them. When the Supreme Court of the State decided this question of fact, it went outside of its bounds as declared by the constitution and statute law passed in pursuance thereof.

The record demonstrates beyond question that the presiding judge did not allow the defendant's counsel to state his position, and the record further shows that the defendant's counsel never one time suggested putting up the defendant as a witness; but that the presiding judge himself, suggested the defendant as a witness and directed that he be put up. And the following day the Solicitor cross-examined him, as outlined hereinabove, on the testimony that he had given, making as many charges against him, it is respectfully submitted, as he asked him questions. Some of them accusing him of the crime with which he was charged, others with procuring witnesses to commit perjury; others with putting something over the court; others with swearing falsely to anything to save himself. When this went to the Supreme Court of the State, it was there decided that the presiding judge did not abuse his discretion in continuing the case or lengthening the session of that day. And notwithstanding the fact that the petition for re-hearing called the court's attention to the issues made, the court, without any further discussion, passed a simple order to the effect that they had re-examined the case and that they had overlooked no questions of law or fact, and allowed the conviction to stand. This, we submit, is taking the liberty of the petitioner in violation of due process and without giving him the equal protection of the law.

Petitioner feels that he was denied his day in court, as is shown by the cumulative effect of the irregularities and errors of law herein presented, and that he did not receive the fair and impartial trial guaranteed him under the rules of the court, the Constitution of 1895 of the State, and the Statute Laws of the State passed in pursuance thereof. Nor did he get such trial as was guaranteed him under the provisions of the Federal Constitution, and the decisions of the Supreme Court of the United States. But that he was denied due process as is guaranteed him under the Fourteenth Amendment to the Federal Constitution. The particular sections and rules invoked are referred to herein specifically. When the Supreme Court of the State eliminated the testimony of Sheriff Henry, which undoubtedly bolstered up the testimony of Henrietta Henderson, the self-confessed perpetrator of the crime, it is respectfully submitted that it denied due process when it adjudged the defendant guilty on the other testimony remaining in the record, the Supreme Court of the State not being permitted under the Constitution or the Statute Law to decide questions of fact, and when the record abounds with testimony of witnesses in Spartanburg and in Greenville, South Carolina, substantiating in detail the claim of the defendant that he was elsewhere than at Henrietta Henderson's house on the day it is alleged the crime was committed. Nearly every witness for the defense, including some highly reputable citizens of Greenville, testified that petitioner was going about his usual business during the entire time it was claimed he made visits to Henrietta Henderson's house. And under our setup of Government, the appellate court being concerned entirely with errors of law, and the right of trial by jury being inviolate, the Supreme Court of the State could not adjudge your petitioner guilty upon the facts it had before it, nor could the Supreme Court of the State, under the present setup, decide that the improp-

erly admitted testimony of Sheriff Henry, and the testimony petitioner was compelled to give by order of the Judge, did not influence the jury on the trial at which he was convicted. The working of the rule one way would necessarily involve its working the other way. If the appellate court can reason that the jury did not convict upon testimony that the prosecuting officer did not rely upon, or testimony of a witness that was ninth from the beginning of the State's case, and thereby hold that other testimony relied upon by the State was sufficient to convict, although the objectionable testimony violated at least three rules laid down by the Supreme Court, it would be entirely impossible to tell where the trial Judge's province ended, and where the jury's province began. How can the Supreme Court tell that another jury, with Sheriff Henry's testimony eliminated, and with the defendant free to take the stand if he chooses, and when he chooses, during the trial of his case, would not be inclined to believe the testimony of the alibi witnesses, including those at Greenville, in another County Seat town several miles from Spartanburg?

The very purpose of a jury trial is to enable the jurors to pass upon the demeanor of the witnesses, including their manner of answering questions. It was never intended that a trial court should take the liberty of a citizen and convict him of an odious offense, a felony, on a written statement, such as the record contained before the Supreme Court in this case; and to do so is to violate the orderly procedure in criminal cases, since this is not a case of a total absence of testimony; but is a case in which a number of witnesses violently contradict one another as to the presence of the defendant at the place of the alleged crime. The cases cited in the record show that the Supreme Court of South Carolina has heretofore held prejudicial the admission of such testimony, and would not even hear argument as to whether it was prejudicial or not.

There is another reason why Sheriff Henry's testimony cannot be treated as uninfluential in this case. We must assume that the County's chief law enforcing officer, when enacting a scene such as he prearranged in the jail for the meeting of Henrietta Henderson and Evans, was endeavoring to get evidence with which to convict; that when he brings this testimony to the courthouse and offers it for the State, and as a State's witness, he thinks it has some influential quality worthy of the time consumed in gathering and presenting it. The Solicitor, when he presents his testimony to the jury for the State, must be indulged in the same presumption. And when defense counsel vigorously objected to such testimony, calling the trial judge's attention to its inadmissibility, and the trial judge overrules that objection, and admits it for the consideration of the jury upon the question of guilt or innocence of the accused, it must be presumed that the trial judge thought it had some bearing on that question. Do we then infer that the jury, after this fight in court for the admission of the testimony, did not consider it in passing upon the testimony, because perchance he was the ninth witness? What drama is it that ends quietly and with the last least, or vice versa?

We submit that such proceeding on the part of the Supreme Court of the State is, as we claimed in our petition for rehearing, a denial of due process to this petitioner, for it is undoubtedly, as cited by the authorities herein, not the regular time honored procedure sanctioned by the Constitution, Statutory Law, and the opinions of the Supreme Court heretofore rendered.

Many of the charges made by the Solicitor, during the cross-examination of the defendant, were based upon the hearsay testimony given by Sheriff Henry, and upon the testimony of the defendant given by him when the judge ordered him to take the stand. We feel that the sheriff's testimony and what the defendant was compelled to give,

and used against him by the Solicitor on cross-examination and otherwise, were so interwoven with the testimony of Henrietta Henderson that it not only gave it a sanctioning official background; but made the sheriff's testimony and that of Henrietta Henderson, together with the charges made by the Solicitor in his cross-examination, so interwoven as to make it impossible for the jury to separate one from the other. Hence, only another jury, without the presence of the Sheriff's testimony and without the defendant being compelled to testify, could give the defendant that orderly trial, which constitutes due process.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of South Carolina, commanding that court to certify and to send to this Court for its review and determination, on a day to be therein named, a full and complete transcript of the record and of proceedings herein; and that the Judgment of the Supreme Court of the State of South Carolina be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

July 12, 1943.

C. Y. BROWN,
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OF WILLIAMS & BUSBEE,
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BRIEF IN SUPPORT OF PETITION.

I. Opinion Below.

The opinion of the Supreme Court of the State of South Carolina filed March 29, 1943, re-hearing denied May 11, 1943, is reported in 25 S. E., 2d., 492; —— S. C., ——, and is found in this record at page 175.

II. Basis of Jurisdiction.

This has already been discussed under the same heading in the petition. If the errors complained of herein are substantial, petitioner has been denied due process as guaranteed under the 14th Amendment of the United States Constitution:

Lisenba v. *California,* 314 U. S. 219.
Moore v. *Dempsey,* 261 U. S. 86.
Powell v. Alabama, 287 U. S. 45, 68.
Baldwin v. *Hale,* 1 Wall. 223, 233.
Cf. Twining v. *Jersey,* 211 U. S. 78, 110.
Betts v. *Brady,* 86 Law. Ed., 1116, 1120.
Betts v. *Brady,* 86 Law. Ed. 1116, 1120, 62 Sup. Ct. 1252, 316 U. S. 455.
Palko v. State of Connecticut, 302 U. S. 325, 58 Sup. Ct. Rep. 151.
Amrine v. *Kines,* 131 F. (2d) 827, and U. S. Supreme Court cases therein cited and discussed.

The *Palko case, supra,* says:

> "On the other hand, the due process clause of the 14th Amendment may make it unlawful for a State to abridge by its statutes",

and we may ask if the same would not hold as to judicial decrees, "the right of one accused of crime to the benefit of counsel", citing the *Powell* case, *supra.*

Says the opinion (Palko):

> "In these and other situations immunities that are valid as against the Federal Government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the 14th Amendment become valid as against the states."

In a state where trial by jury is not abolished; but, as in South Carolina, made inviolate by its constitution, would not Art. 6 U. S. Constitution have the same application? And Art. 5, U. S. Constitution the same, under the same conditions?

In *Brady, supra,* it is held that asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case.

The Constitution of the State of 1895, Art. 1, Sec. 5 (set out hereinafter), providing that citizens of the United States in South Carolina, should enjoy the equal protection of the laws and be not deprived of liberty without due process was a promise to every person accused of crime. The Federal Constitution guarantees to the citizen the same protection.

In *Smith* v. *O'Grady,* 312 U. S. 329, 61 S. Ct. 572, the Court said:

> "The constitution is the supreme law of the land, and upon the State Courts, equally with the Courts of the Union, rests the obligation to guard and enforce every right secured by that constitution."

To the same effect is *Mooney* v. *Holohan,* 294 U. S. 103, 113, 55 S. Ct. 340, 342, 79 L. Ed. 791. Hence, upon these authorities, petitioner contends that the Supreme Court of the State was not only duty bound to enforce the provisions of its own constitution, but those of the Federal Constitu-

tion, protecting the defendant in his constitutional right to due process and the equal protection of the law.

In South Carolina the exception to the Supreme Court is governed by *Sec. 6 of Rule 4, Code 1942, page 1435.* That rule reads:

> "Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and the mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exceptions should not be long or argumentative in form."

Construing this rule, the Supreme Court of this State has held:

> "Exceptions where not misleading are to be liberally construed. McMahan *v.* Walhalla Light, etc., Co., 102 S. C. 57, 60, 86 S. E. 194. See also State *v.* Atkins, 126 S. C., 459, 120 S. E. 487.
>
> "If such an examination of an exception as may be necessary to disclose that it is framed in violation of this rule also discloses that the exception clearly embraces a meritorious assignment of prejudicial error, the Supreme Court will ordinarily waive the breach of the rule and consider the exception, but otherwise the exception will not generally be considered. Jackson *v.* Carter, 128 S. C. 79, 121 S. E. 559."

(Code annotation to said rule, page 1435).

The case, however, of *State* v. *Griffin,* quoted from hereinafter, requires the court in case of felony to take notice of any error apparent upon the record

> "by which the prisoner has been deprived of any of the substantial means of enjoying a fair and impartial trial". (124 S. E. 81, 129 S. C. 200).

Hence, it is not necessary in exceptions to the Supreme Court from rulings of the Trial Court, that the exceptions should point out whether the right is claimed under a statute, constitution, decision or common law. If there is merit in the exception, even though it violates the rule, the Court considers the exception; and if the charge be felony, as this is, the Court will consider an error in the record, even though no exception is taken thereto. In other words, this is a part of the due process enjoyed by an accused person on trial in South Carolina.

In the case of *Nickey* v. *State of Mississippi*, 54 S. Ct. 743, 292 U. S. 393, Mr. Justice Stone, speaking for a unanimous Court, said:

> "This case is here on appeal, section 237 of the Judicial Code (28 USCA sec. 344), from a decree of the Supreme Court of Mississippi allowing recovery of delinquent taxes assessed upon appellants' lands within the state and overruling their contention that the assessment of the tax and the decree for its payment infringe the due process clause of the Fourteenth Amendment. 167 Miss. 650, 145 So. 630, 146 So. 859. So far as the state court discussed these contentions with specific reference to the Constitution of the United States, both in its original opinion, and in an opinion denying the appellants' application for rehearing, they may be reviewed here, notwithstanding the failure of appellants to mention them in their assignment of errors to the state supreme court, as required by its rules. Wall *v.* Chesapeake & Ohio R. Co., 256 U. S. 125, 41 S. Ct. 402, 65 L. Ed. 856; Staltonstall *v.* Staltonstall, 276 U. S. 260, 267, 48 S. Ct. 225, 72 L. Ed. 565; Cumberland Coal Co. *v.* Board of Revision of Tax Assessments, 284 U. S. 23, 24, 52 S. Ct. 48, 76 L. Ed. 146. We confine our opinion to the question thus discussed."

It being seen that the errors in the record of the conviction of petitioner are perfectly apparent, and that in a

felony case they would be considered without exception, and that if the State Court discusses the questions, this Court will review them, let us briefly turn to the exceptions raised on appeal to the Supreme Court. The first exception questions the admissibility of the testimony of Sheriff Henry. This the Court held inadmissible for at least two reasons. The second exception questions the refusal to grant a motion to suspend five minutes before time announced for adjournment, and a ruling ordering the defendant to take the stand. Pages of these exceptions and rulings are referred to in this record elsewhere. The former rulings of the Trial Judge were held improper by the Court in this case, and the rulings presented by the second exception are violative of both the State and Federal Constitutions and the statute law of the State, referred to herein. The exceptions clearly presented the rulings complained of, showing that they were not orderly procedure, and when the Supreme Court decided the case, the petition for rehearing again called these matters to the attention of the Court and urged the Supreme Court's inadvertence and again referred to the authorities and asked the Court if that was due process (ff. 722-738, Appendix). The authorities referred to were *Sec. 17, Art. 1, Constitution S. C., Sec. 18, Art. 1, Constitution S. C., Amendments 5 and 6 U. S. Constitution, Sec. 1011, Code 1942,* and the cases of *Town Council* v. *Owen* and *State* v. *Howard,* from both of which quotations are elsewhere in this petition.

The Supreme Court had considered all these constitutional provisions, both State and Federal, and said in its opinion:

> "The action of the Court exhibited nothing more than a desire to facilitate the progress of the trial, and, in our opinion, was not indicative of any intention to force the defendant to take the stand in violation of

his constitutional right, nor to testify if he chose not to do so" (R. 719).

In disposing of the petition for rehearing the Court said it was satisfied that no meritorious ground had been presented by the petition (R. 742).

On page 182, R. 714, is the precise language the judge used

> * * * "I am not going to lose this hour if I can help it; if you have anybody; if you have anybody else, we will go on. How about the defendant—are you going to put him up?
>
> "Mr. Brown: After the witness we will have, here is what we had in mind. We have eliminated a lot * * *
>
> "The Court: Put the defendant up—you've got an hour for that. Bring the jury back. (Jury returns) Proceed gentlemen."

"The rule of the Circuit Court, that being the Court in which the petitioner was being tried, provides:

> "Counsel shall not attempt to argue or explain a case, or any matter arising therein, after he has been heard, and the opinion of the Court has been pronounced: *Provided,* No argument shall be had on any objection to the admissibility of evidence unless especially requested by the presiding Judge; nor shall one attorney interrupt another in the course of his argument without first obtaining the permission of the Court." Rule 11, page 1402 Code 1942.

This rule had been violated in that the Trial Judge did not let Mr. Brown state what he had in mind after hearing the witness he had, as he had a right to do under the rule itself, as well as under the Constitutions; but if Mr. Brown had undertaken to speak again he would have been guilty of contempt, the opinion of the court having been announced;

nor could any further argument be made on the admissibility of the evidence under the rule above mentioned.

The opinion of the State Supreme Court was that the evidence, after eliminating Sheriff Henry's testimony, was such as to convict before any honest jury. It being recalled that the jury under the South Carolina Constitution is the sole tribunal to try the facts, that Constitution being adopted in 1895 (S. C. Code 1942, page 1162), it was a denial to the petitioner of due process for the Supreme Court to adjudge petitioner guilty upon the evidence beyond a reasonable doubt, using as authority the case of the *State* v. *William Ford,* 3rd Strobart Law Reports, page 517, 34 S. C. Law, page 271, that decision having been decided on appeal from Spartanburg, Spring Term 1939, when the Judges could express their opinion upon the facts of the cases. But certainly, it is respectfully submitted, that if it is the province of the jury to weigh the force and effect of the testimony of an alleged accomplice, as in the law in South Carolina now, it is axiomatic that the Supreme Court cannot, being a law Court entirely, after eliminating the corroborative testimony of an accomplice (entwined with alleged confessions of the accused, in a three-cornered conversation with an officer, while under arrest), and thereupon adjudge of the strength and sufficiency of the remaining testimony to convict the accused.

In the case of *State* v. *Sowell,* 85 S. C. 278, the Supreme Court of the State, page 283, says:

> "Under our Constitution, the force and effect, or weight and sufficiency of testimony must be left exclusively to the jury, uninfluenced by any expression or intimation of opinion thereof by the Circuit Judge, who, however, has the power to correct any error into which they may fall, in the exercise of his discretion to grant new trials."

And the same case holds (page 281) that not since the Constitution of 1868 could a Judge express his opinion with

reference to the facts in a trial at which he is presiding; and that the testimony of an accomplice, whether corroborated or not, is exclusively for the jury. A distinction is made also between the Constitution of 1868 and that of 1895, to the extent that under the former the Judge might state the testimony and declare the law; but under the latter "Judges shall not charge juries in respect to matters of fact, but shall declare the law" (page 281, 85 S. C.).

Following the same theory of making the jury the sole judges of the force and effect of the testimony of an alleged accomplice, the General Assembly of South Carolina agreed to let persons convicted of, or pleading guilty to, felony, testify (such testimony having been incompetent before the passage of the act); but it carefully safeguarded the right of the accused. 1012-1 Code 1942 says:

> "No person shall be disqualified to testify in the trial of any cause in the courts of this State by reason of conviction and sentence for any crime. The fact of such conviction and sentence may be established and the credibility of the testimony of any such witness shall be entirely for the jury or the court determining the facts at issue, as the case may be. 1934 (38) 1193."

This was enacted in 1934 in order to let a felon who was an accomplice, when he was probably the only witness, prevent the failure of justice entirely; but it said that the weight and effect of such testimony is entirely for the jury in a jury case, or for the Judge in a case that is being tried without a jury, such as in the Courts of municipalities, and Justices of the Peace where there are no Constitutional provisions guaranteeing the accused the right of trial by a jury.

The promise in the State Constitution must be fulfilled. *Smith* v. *State of Texas*, 311 U. S. 128, 61 S. Ct. Reports, 164.

The Fourteenth Amendment refers to all instrumentalities of the State, legislative, executive and judicial. Nor is

form all that is required; but substance as well. It is not important that the defendant neither filed nor offered to file a plea especially setting up or claiming a right under the Constitution. It is sufficient if it was claimed in the State Court in such manner as to bring it to the attention of that Court. *Chicago Burlington, etc.* v. *Chicago,* 166 U. S. 226.

Referring again to the case of the *State* v. *William Ford,* 3rd. Strob. Law (S. C.), page 527, it is interesting to note what those distinguished judges said about deciding the case on appeal on the evidence taken at the trial. And immediately following the quotation in the opinion, (ff. 709-710) is the following:

> "When even the prisoner's counsel confess their convictions of his guilt up on the other proof, how can there be any danger of erring in refusing a new trial under the rule just stated? * * *"

The rule applied in that case, even if it were applicable under the Constitutional Provisions of this State now, though we submit it is not, is a far cry from the record in this case. Even after petitioner was forced to the stand, seven defense witnesses were examined, even the ladies from Greenville, an adjoining County Seat, to support the alibi of petitioner, were sworn and examined. This fact of the great number of witnesses sworn, after Mr. Brown attempted to get the adjourment five minutes before the time previously fixed for adjournment, most of them bearing upon the alibi, a distinct angle in the case, demonstrates that the Supreme Court of the State, when it indicated that Mr. Brown had stated that the defendant would be offered after another witness, was entirely in error. The Court said "it appeared simply to be a question of putting the defendant on the stand before or after the witness who was expected to arrive" (f. 719). To get this construction

from the record, the Court would yet have to conclude that Mr. Brown had not completed his statement when he was interrupted by the Judge. It is true that the comma did not appear after the word "have" (f. 714). Mr. Brown's statement was that "after the witness we will have, here is what we had in mind.

"We have eliminated a lot * * *", and here he was cut off. If he had intended to say that he would put the defendant up after a witness he would have next day, he would not have concluded by saying that he had eliminated a lot, and stopped in the middle of a sentence. The fact is that he had several witnesses yet to put up. He evidently intended to put up one witness, and adopt a method that would shorten the length of the trial, for he talked of having eliminated a lot of something that he was not allowed to state.

III. Question Presented.

Whether under the undisputed facts and the law applicable thereto, petitioner has been denied due process of law and the equal protection of the laws under said 14th Amendment by the Supreme Court of South Carolina on appeal from the General Sessions Court of Spartanburg County, said State, the former having affirmed judgment of the latter and adopted the findings thereof as its own, in that

(a) The trial judge allowed the solicitor to prove by the sheriff of Spartanburg County over the objection of petitioner, the details of a conversation between petitioner and his co-defendant, the self-confessed perpetrator of the crime complained of, when the sole object of said inquisitorial conversations was for the purpose of incriminating the defendant, though highly improper and inadmissible for more than one reason.

(b) The trial judge erred in refusing to let petitioner's counsel make a motion and state the grounds thereof five

minutes before the time appointed for the adjournment of court, and thereupon, instead, ordering the defendant to take the stand and be sworn and examined, without advice or consent of counsel.

(c) The Supreme Court approved of the judgment and sentence upon the verdict of the jury after having held that the testimony of Sheriff Henry was improperly submitted to the jury for their consideration under their oath, as bearing upon the guilt or innocence of the accused, and substituted ther own findings upon the facts, after the elimination of such testimony, when said court, by the Constitution and Law of the State is confined to the settlement of questions of law entirely, thereby denying petitioner due process and the equal protection of the laws, although the record, especially the cross-examination of the defendant, bristled with prejudicial irregularities.

SUB-DIVISION A.

The opinion of the State Supreme Court in petitioner's case (R. 175) holds that Sheriff Henry's testimony was inadmissible, for more than one reason, a most important one being that he denied the incriminating statements made by Henrietta Henderson; the other reason mentioned by the court being that it violated the rule against hearsay. However, the court reasons that since the witness was ninth removed from the self-confessed perpetrator of the crime, and since his counsel had the privilege of cross-examination, the testimony had no effect upon the jury. The court reasoned further that Henrietta Henderson's testimony showed the guilt of the defendant, saying it showed his connection step by step. In other words, that her testimony was just as strong without the sheriff's as it would have been with the Sheriff's. The court adopted her statement in toto, although a number of witnesses, disinterested and of good

standing, from Greenville, South Carolina, and Spartanburg, South Carolina, showed an alibi for the accused throughout the entire time when Henrietta Henderson accused him, in the proceeding before the Sheriff and in her testimony, of being in her home connected with the crime charged. The court then uses the admission of the defendant in conversation with the Sheriff and Henrietta Henderson, (or on the witness stand, when the Judge had directed him to testify), to the effect that the Crawford girl had been employed by him four months before her death, and that she had her living quarters there, together with other circumstances testified to by Henrietta Henderson, and admitted in part by him, (as paying the bonding fee, and asking Henrietta Henderson to go to his attorneys' office and state what she told him as the truth), all deemed by the court as incriminating, to show, along with other circumstances mentioned by the court, that the defendant was guilty beyond a reasonable doubt, even holding that the purpose of the accused was to suppress the testimony of Henrietta Henderson. The stenographer who wrote the statement testified to the contrary. The inferences to be drawn from the circumstances detailed and from the testimony admissible, were for a jury; and not for a law court. And when the Supreme Court has held that, even where no objection to such testimony is made, and no exception thereto is taken, the court will, of its own motion, declare such testimony inadmissible and reverse the judgment below.

In the case of *State* v. *Griffin*, 124 S. E. 81, 129 S. C. 200, the South Carolina Supreme Court said:

> "This court is bound in a capital case (and we may think equally so in a case of felony involving the deprivation of the defendant's liberty), to take notice in behalf of the accused of any error apparent upon the

record by which the prisoner has been deprived of any of the substantial means of enjoying a fair and impartial trial," quoting from *State* v. *McNinch,* 12 S. C. 89.

In the same case (*State* v. *Griffin*), Justice Cothran, delivering the opinion of the court, says that:

> "The privilege, we think, should be extended even further than this, and held to cover testimonial compulsion under any circumstances. The line of cleavage is whether the proposed evidence is the testimony of the defendant or evidence in itself unaided by any statement of the defendant."

Hence, for the foregoing additional reason Sheriff Henry's testimony, as well as any admissions gained from the testimony of the defendant, after he was ordered to take the stand, were inadmissible and prejudicial, and should have warranted a new trial. Testimony obtained in this manner was held in the foregoing case to be so. The Court, in ordering a new trial in said *Griffin* case said:

> "We are of opinion, therefore, that the evidence referred to in the second question, above stated, was inadmissible and prejudicial, and its admission constituted reversible error." S. E. 124 page 87.

The *Griffin* case was where the defendant was charged with attempting to administer poison to another, and the exception sustained was to the testimony of the Sheriff to the effect that he compelled the defendant to put her foot in the track (she was suspected of making), and that she would not do it in the right way.

The Constitution of the State of 1895, Art. 1, Sec. 25, provides:

> "The right of trial by jury shall be preserved inviolate."

Sec. 5 (same Constitution) provides:

> "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property, without due process of law, nor shall any person be denied the equal protection of the law."

Sec. 17 (same Constitution) provides:

> "* * * Nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall be compelled in any criminal case to be a witness against himself, * * *."

Sec. 4, Art. 5, State Constitution 1895, declared:

> "The Supreme Court * * * shall constitute a court for the correction of errors at law under such regulation as the General Assembly may, by law, prescribe."

Sec. 26 (D) S. C. Code 1942, provides:

> "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases."

In the case of *Whisenhunt* v. *Atlantic Coast Line Railroad Company,* 10 S. E. 2d, 316, — S. C. —, the Supreme Court of South Carolina said:

> "The questions raised by the testimony were jury issues, and were properly submitted to the jury. The function of this court is not to try cases on the facts, but correct errors of law on appeal. Constitution of 1895, Art. 5, Sec. 4, Rylee *v.* Marett, 121 S. C. 366, 377; 113 S. E. 483."

The constitutional and statutory provisions aforesaid show clearly, that when the Supreme Court of this State finds upon the facts, it is violating due process, and deny-

ing the accused the equal protection of the law, especially so when it failed to follow the *Griffin* case, holding such testimony inadmissible and prejudicial.

In *Securities & Exchange Commission* v. *Chenery Corp.*, 63 S. Ct. 459 (Adv. S. Feb. 15, 1943), this Court held:

> "* * * But it is also familiar appellate procedure that where the correctnes of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. * * *"

The Article of the United States Constitution referred to in the brief before the State Supreme Court (Amendment 5), also declares that the accused shall not be "compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. * * *"

SUBDIVISION B.

The rule of the Circuit Court of South Carolina, the Sessions Division of which the defendant was being tried in, provides:

> "Counsel shall not attempt to argue or explain a case, or any matter arising therein, after he has been heard and the opinion of the Court has been pronounced". Rule 7.

When the Presiding Judge ruled, before counsel could complete his motion, it would have been contempt of court to argue the question further. This, we contend, was a denial of due process to petitioner when, under such circumstances, the Presiding Judge ordered the defendant to take the stand and testify. The constitution of South Carolina says, (Art. 1, Sec. 18):

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impar-

tial jury, and to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel, or by both."

It does not require more than a glance at the attempt of Mr. Brown to make his motion and state the grounds thereof, and the decision and order of the judge, to determine that the accused was not "fully heard in his defense by himself or by his counsel, or by both", when it was the purpose of Mr. Brown, after having worked all day and examined more than a dozen witnesses, to tell the court how he had planned to eliminate some of the work, and what his plan of conducting the defense would be if the court would give him an adjournment five minutes before the time previously set for the evening adjournment.

Moreover, the Constitution of this State, as above indicated (Art. 1, Sec. 17) declares: No person shall "be compelled in any criminal case to be a witness against himself."

A Statute (1011 of the S. C. Code of 1942) provides:

"In the trial of all criminal cases, the defendant shall be allowed to testify (if he desires to do so, and not otherwise) as to the facts and circumstances of the case."

In the case of *State* v. *Howard*, 35 S. C. 203, 14 S. E. 481, the Supreme Court of this State said:

"* * * To our minds, these two provisions, one of our constitution and the other of our statute law, look to an absolute freedom of defendants, in all criminal cases, as to testifying; the former indicates that such a one shall not be forced to testify, while the latter is purely permissive, provided he chooses to do so. This being the case, it almost of necessity follows that nothing shall result to his prejudice from a failure to testify."

The Constitution of the United States (Art. 5), declares that no defendant "* * * shall be compelled in any criminal case to be a witness against himself." * * *

And Article 6, United States Constitution provides:

> That the accused shall "* * * have the assistance of counsel for his defense."

The Court has observed, no doubt, that the State Constitution extends the privilege of due process and equal protection of the laws to "citizens of this State and of the United States under this Constitution * * *". Sec. 5, Art. 1, Constitution South Carolina 1895.

Construing the effect of ordering a defendant to testify, regardless of whether the testimony was prejudicial or not, though it will be recalled that in the *Griffin* case, *supra*, the State Supreme Court did say it was prejudicial, in the case of *Town Council* v. *Owens*, 61 S. C. 24, the Supreme Court of South Carolina said:

> "One of the grounds of appeal presented by Dr. J. M. Owens goes to the root of the matter of his conviction, viz: that he was required to give testimony while he was on trial for a crime. Sec. 17, of art. 1, of our State Constitution, provides: '* * * nor shall he be compelled in any criminal case to be a witness against himself.' He was the only witness sworn. While we do not express any opinion as to the effect of his testimony, still we are bound to reverse the judgment against him on the ground that he was compelled to testify aaginst himself. Because the defendant made no objection to his being sworn and no objection as to his testifying, does not alter his constitutional right. A man might subject himself to punishment for contempt, if he objected to testifying when forced or called upon to do so. It is not in accord with the orderly administration of justice to swear a defendant as a witness against himself in any Court; indeed; as we have seen, the Constitution forbids it." * * *

It will be noted in the record of petitioners that he never at any time offered to testify, nor did his counsel offer him

as a witness; but when asked if he was going to testify, started to tell what he had in mind after examining a witness that he had, when the Court said for him to put the defendant up. In the *Owens* case, the Supreme Court of this State refused to go into the question of whether it was prejudicial or not, but said it was not orderly procedure and that there must be a new trial.

That this is one of the substantial rights enjoyed by a defendant is generally recognized by the courts of all the States; and there is no stage of the trial where the defendant needs to confer with his counsel more than after the close of a day of testimony, where there was no decision between counsel and client as to what the procedure would be thenceforward; and when the court ordered the defendant to the stand without allowing his counsel to be heard, and without the advice and privilege of consultation with his attorney, we submit that the accused was denied due process.

In addition to the general recognition of this right by the States, in the case of *Johnson* v. *Zerbst*, 58 S. Ct. 1002, 304 U. S. 463, the Supreme Court says, referring to the accused:

> "* * * He requires the guiding hand of counsel at every step in the proceeding against him. * * *"

SUBDIVISION C.

The Supreme Court of the State, although not calling them specifically by name and number, passing upon the protective constitutional provisions, State and Federal, said, in speaking of the trial court, when the Presiding Judge forced the defendant to the stand:

> "The action of the Court exhibited nothing more than a desire to facilitate the progress of the trial, and, in our opinion, was not indicative of any intention to force the defendant to take the stand in violation of his constitutional right not to testify if he chose not to do so."

The cases cited hereinabove show that this violates both Federal and State Constitutional provisions, and that the Supreme Court of this State has reversed judgments heretofore without even inquiring whether the accused was prejudiced. The record shows that neither counsel nor accused, in the instant case, expressed any desire or intention that the defendant testify. The decisions of this State hold that where one gives evidence against himself, when testifying against his constitutional privilege, that the court will reverse the judgment as prejudicial without even examining to see what the extent of the injury or prejudice might have been. Believing, and respectfully submitting, that the petitioner has not had that orderly trial that due process would have given him, we submit that the writ should issue and that the judgment and sentence of the Sessions Court of Spartanburg County should be reversed.

In the case of *Mooney* v. *Holohan,* 98 A. L. R. 410, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, this Court said:

> "* * * Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution. Robb *v.* Connolly, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 S. Ct. 544." * * *

Conclusion.

For the reasons set forth above, it is respectfully submitted that this case is one which justifies the granting of a writ of certiorari and thereafter reviewing and reversing the adverse judgments involved, and that the writ prayed for should be granted.

June 26, 1943.

C. Y. Brown,
John F. Williams,
Counsel for Petitioner,
Aiken, S. C.

APPENDIX

(9)

To

JUL 22 1942
CHARLES ELMORE CROPLEY
CLERK

The State of South Carolina

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

HONORABLE THOS. S. SEASE, *Judge*

THE STATE OF SOUTH CAROLINA, *Respondent*

against

WILLIAM E. EVANS, Appellant

TRANSCRIPT OF RECORD

C. Y. BROWN,
D. W. GALLOWAY,
Appellant's Attorneys

SAM'L R. WATT,
Solicitor,
7th Judicial Circuit, S. C.
Respondent's Attorney.

Trial JULY TERM
28th July, 1942.

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Fishburne, A. J.: The indictment in this case is based upon Section 1112, 1942 Code, the pertinent portion of which reads as follows: 685

> "Any person * * * who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and, upon conviction thereof, 686 shall be punished by imprisonment in the penitentiary for a term of not more than twenty years nor less than five years. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman."

The abortion was performed upon Inez Crawford, a young woman eighteen years of age, on June 23, 1942, by Henrietta Henderson, a former negro midwife, at her home some miles out of the city of Spartanburg. This criminal operation was followed by miscarriage and death, on June 26th, and the defendant was indicted for his alleged part in the crime. 687

From a judgment of conviction the defendant appeals to this Court, raising two issues, the first of which imputes error to the lower Court in admitting over objection the testimony of Sheriff S. M. Henry, in which he undertook to testify to certain statements made by Henrietta Henderson in the presence of the defendant, William E. Evans, while both of them were under arrest in the county jail.

Sheriff Henry and two other officers arranged an interview in which Evans was confronted by Henrietta 688

Henderson, who made accusatory statements to Evans,
689 or in his presence, tending to incriminate him in the procurement of the criminal abortion. This testimony is not over long, and we quote it:

"Q. Whom did you bring into the room, into Mr. Evans' presence? A. Brought Henrietta Henderson.

"Q. What did she state to Mr. Evans, and in his presence? A. She stated that Mr. Evans had come over there to her house, after the car had left her house and the girl; and after she arrived home the girl was at her house a couple of hours,
690 something like that, Mr. Evans come back to her house and stayed for some time; and she carried her out and done the job what she stated. She said that she used something, some instrument on this girl * * *.

"Q. What did she say she used it for? A. For to cause a miscarriage.

"Q. Where did she say that took place? A. In her house in the back room, in the presence of Mr. Evans.

691 "Q. Where did she tell Mr. Evans he was sitting? A. In the room just opposite, on the couch or lounge; said her husband was there with him.

"Q. What happened, when they came out of the room? A. The girl had Ten Dollars folded up in her hand, and give it to Henrietta, and told her Mr. Evans give her the Ten Dollars to give Henrietta * * *.

"Q. Wait a minute: What did she say about—did Mr. Evans say anything about he was respon-
692 sible for it?

"The Court: Don't lead the witness.

"Q. Do you remember what she said and what Mr. Evans said? A. She said Mr. Evans told her that he was the cause of the woman being in that fix. 693

"Mr. Brown: We are reserving our exceptions * * *.

"Mr. Watt:

"Q. How did she say she left there? How did she say they left there? A. Said he promised her another Five Dollars; and he left there with her in the automobile.

"Q. When she finished telling it, what did Mr. Evans say to Henrietta? A. Well, he denied it. 694

"Q. What else did he say? When Henrietta told him: 'Mr. Evans, you came by my house after the girl had died, and tried to get me to leave,' what did he say? A. He said he did not do it.

Cross Examination

"Mr. Brown: Now, subject to our objection and exceptions, we will ask these questions:

"Q. Now, Sheriff, Mr. Evans denied his guilt before and after he saw Henrietta, did he not? A. Yes, sir; he denied it." 695

There are two questions relative to the reception of this testimony: Was the evidence competent under the rules governing the introduction of confessions and admissions? And, Was its admission prejudicial to the defendant as violating the hearsay rule? If, by the admission of testimony which should not have been received, it is probable that the minds of the jury were influenced to a greater degree against the defendant than if no such testimony had been received, then the 696

error would be deemed prejudicial to the defendant. *Entzminger v. Seigler*, 186 S. C., 194, 195 S. E., 244.

697 The appellant contends that the foregoing testimony was inadmissible under the rule announced in *State v. Hester*, 137 S. C., 145, 134 S. E., 885, to the general effect that testimony as to the failure of a defendant to deny or refute a charge of guilty, made when he is under arrest and in the presence of officers, is inadmissible in evidence in his subsequent trial; that under such circumstances he may stand mute, and his silence will not be taken as a tacit admission of guilt. The *Hester case* is not applicable here, because the de-
698 fendant did not maintain silence.

The evidence, however, is objectionable and inadmissible upon another ground. The defendant not only did not stand mute, but made a complete and positive denial of the incriminating statements made by Henrietta Henderson, and under these circumstances the testimony should have been excluded.

Statements accusing or incriminating accused made in his presence, but unequivocally denied by him *in toto*, are not admissible against him. They do not show
699 an admission, and are not admissible merely because made in his presence. The defendant's denial of the third person's statement destroys entirely the ground for using it. *State v. McIntosh*, 94 S. C., 439, 78 S. E., 327, 22 C. J. S., Section 734, page 1265; *Pinn v. Commonwealth*, 166 Va., 727, 186 S. E., 169; Wigmore on Evidence (3rd Ed.), Volume 4, Section 1072, page 74 *et seq.*

The testimony of Sheriff Henry also violated the rule against hearsay, and on this ground was inad-
700 missible. But did the reception of this evidence constitute prejudicial error? The defendant upon his trial

was confronted by the witness Henrietta Henderson, and fully exercised his privilege of cross-examining her, and her testimony went much further than the statement she made to the sheriff in circumstantial detail. While the testimony of Sheriff Henry should not have been received, this, in our opinion, did not result in prejudicial error nor affect the result of the verdict, as we shall attempt to show. 701

It is plain, we think, that the State did not rely for conviction upon the testimony of Sheriff Henry, who was the ninth and last witness offered by the prosecution. Henrietta Henderson, also indicted, had pleaded guilty, and was offered by the State as its first witness. 702 Her testimony showed, step by step, the direct connection of the defendant, Evans, with the crime charged against him. From this testimony, and from that of many other witnesses, the jury was amply justified in believing that the defendant initiated and planned the procurement of the abortion, and was present in the negro woman's house, in an adjoining room, while it was being performed. She testified that the defendant brought the girl to her home and solicited her to perform the criminal operation, and admitted that he was responsible for her condition. 703 It is admitted that Inez Crawford had been employed by the defendant in his undertaking establishment as a receptionist about four months before her death, and that she had her living quarters there. It is further shown that within a few hours after Henrietta Henderson had been arrested and imprisoned, the defendant secured bondsmen for her release at a cost to him of $30.00, and that he immediately thereafter interviewed her in the effort to suppress her evidence against him. 704 That before her arrest he went out to her home in the

country and attempted to get her to flee, which she refused to do.

705 No contention is made that there was not sufficient evidence to warrant the submission of the case to the jury, so that we will not attempt a resumé of all of the evidence. But it should be stated that the testimony of Henrietta Henderson is corroborated not only by her husband who said he was present in the house with the defendant when the operation was performed, but by numerous other witnesses. Incriminating circumstances testified to by witness after witness, some of whom were his employees, all indisputably point to
706 the defendant's guilt. Every element of the crime is proved by overwhelming evidence, independently of the statement testified to by the sheriff, and the error of the Court in admitting his statement may safely be disregarded as harmless.

After a thorough examination of the whole record, we are convinced that the testimony did not affect the result of the trial, and its admission did not invade a substantial right of the defendant. In the light of the testimony in this case, we do not believe that an in-
707 telligent and honest jury could be impaneled who, with a due regard for their oaths and the testimony, could legitimately come to any conclusion other than that the appellant was guilty.

Where guilt is conclusively proved by competent evidence, and no other rational conclusion could be reached but that the defendant is guilty, a judgment of conviction should not be set aside because of unsubstantial errors not affecting the result. *State v. Ford,* 3 Strob., 517, 526 (34 S. C. L.); Wigmore on Evidence (3rd Ed.), Volume 1, Section 21.

708 The rule approved by this Court was clearly stated by Judge O'Neall in *State v. Ford, supra,* as follows:

"According however, to a well settled rule in criminal cases, if the prisoner's guilt were clearly made out by proper evidence, in such a way as to leave no doubt in the mind of a reasonable man, his 'conviction ought not to be set aside because some other evidence was received which ought not to have been.' The rule is, I know, to be tenderly and cautiously applied; and I would be the last man on earth to apply it where there was room to doubt. But when I know that the prisoner's guilt is as plainly made out by the other evidence, as it is possible to be done, I should feel that I was literally straining at a gnat, while, in fact, I was swallowing a camel, if I hesitated in applying it to this cause."

The second question presents for review the action of the presiding Judge in continuing the session of the Court after the hour previously announced for adjournment had been reached. It is contended that in so doing he forced the defendant to take the stand prior to the time planned by his counsel, and that the Court took over the direction of the defense; that counsel was taken by surprise, and had no opportunity to consult with their client with reference to the testimony which had been given against him earlier in the day.

The trial of this case was commenced on July 27, 1942, and ended the next day. At the time referred to, on the first day of the trial, the State had introduced nine witnesses, and the defense eight. It is not entirely clear from the record, but it may be inferred that announcement had been made that the sessions of the Court would run from 9:30 A. M., to 1:00 or 1:30 P. M., and from 3 P. M., to 6 P. M. After the conclusion of the

testimony given by the eighth witness for the defense,
713 this occurred:

"Mr. Brown: We wish now to ask that your Honor suspend until tomorrow morning; we have a witness that will be here. We'll have them here. Your Honor announced the hours of Court would be 9:30 to 1:00 or 1:30, and 3:00 to 6:00, and we made our arrangements to work accordingly * * *.

"The Court: Is there nothing else you can do, gentlemen, between now and seven o'clock? Let the jury go in the room there. (Jury retires.) I
714 am not going to lose this hour if I can help it; if you have anybody else, we will go on. How about the defendant—are you going to put him up?

"Mr. Brown: After the witness we will have here is what we had in mind. We have eliminated a lot * * *.

"The Court: Put the defendant up—you've got an hour for that. Bring the jury back. (Jury returns.) Proceed, gentlemen."

The granting or the refusal of an adjournment or
715 suspension of a trial of a criminal case rests in the sound discretion of the trial Court, and the Court in the exercise of its discretion, if the rights of the accused are not thereby prejudiced, may determine that the session shall open at an hour other than the customary opening hour, or that the session shall continue after the customary hour of adjournment. 23 C. J. S., Section 985, page 329.

The question for decision here is whether the rights of the accused were prejudiced, as claimed, by extending the session beyond 6 o'clock P. M. The record shows
716 that counsel made no statement to the Court that he desired time or opportunity to consult with his client,

the accused, prior to offering him as a witness; nor does it appear that surprise, if present, worked to his disadvantage. Nor does the examination of the defendant by his counsel reveal that any additional time was needed. In fact, while the direct examination of the defendant was proceeding, it was interrupted by the adjournment of Court for the day, and this examination was resumed by defendant's counsel the next morning, so that even if additional time had been needed for consultation it was offered during that period of adjournment. 717

We do not think that there is any merit in the suggestion that the Court assumed direction of the defense and forced the defendant to become a witness. In reply to the Court's inquiry: "Are you going to put him (the defendant) up?" counsel stated, in effect, that the defendant would be offered as a witness after another witness for the defense had been examined. It appeared simply to be a question of putting the defendant on the stand before or after the witness who was expected to arrive. The action of the Court exhibited nothing more than a desire to facilitate the progress of the trial, and, in our opinion, was not indicative of any intention to force the defendant to take the stand in violation of his constitutional right not to testify if he chose not to do so. 718 719

Appellant excepts because the Circuit Judge ordered all of the testimony taken in the trial below incorporated in the record for appeal to this Court. It is contended that only the selections we have quoted in this opinion should have been printed. There was no error. In passing upon the appeal this Court found it necessary to examine the entire record. 720

In our opinion, the defendant has had a fair and im-
721 partial trial, and we see no merit in the exceptions.

Judgment affirmed.

Mr. Chief Justice Bonham, Messrs. Justices Baker and Stukes, and Circuit Judge William H. Grimball, Acting Associate Justice, concur.

PETITION FOR REHEARING

The defendant, W. E. Evans, petitioning the Court, would respectfully show:

1. That he is the Defendant in the above-entitled ac-
722 tion and has been acquainted by his Attorneys with the decision of this Court filed under date of March 29, 1943.

2. That your Petitioner verily believes that the Court misapprehended the full significance of this Defendant's Argument in connection with the alleged error of the Trial Judge in connection with the two exceptions taken by the Defendant and argued by his Attorneys before this Court in the following particulars, to wit:

723 (a) This Court held in its decision in ruling upon Question Number One on appeal that:

> "The evidence, however, is objectionable and inadmissible upon another ground. The Defendant not only did not stand mute, but made a complete and positive denial of the incriminating statements made by Henrietta Henderson, and under these circumstances the testimony should be excluded.
>
> "Statements accusing or incriminating accused made in his presence, but inequivocably denied by him *in toto,* are not admissible against him. They
724 do not show an admission merely because made in his presence—

"The testimony of Sheriff Henry also violated the rule against hearsay and on this ground was inadmissible. But did the reception of this evidence constitute prejudicial error—? 725

"After a thorough examination of the whole record, we are convinced that the testimony did not effect the results of the trial, and its admission did not invade a substantial right of the Defendant."

The Court by this ruling held that all of the material evidence offered by Sheriff Henry was inadmissible and objectionable. In doing this the Court overlooked the fact that the able Solicitor of the Seventh Judicial 726 Circuit argued its admissibility and had it admitted over the objection of the Attorneys for this Defendant. Had it not been material and had the Solicitor not considered it material, why should he have insisted upon its admission and taken the time of the Court to put Sheriff Henry upon the stand? If it was not considered material would Sheriff Henry, the Chief Law Enforcement Officer, have offered himself as a witness?

Up until Sheriff Henry was placed on the witness 727 stand, the only direct evidence as to the crime was from a self-confessed perpetrator of this crime and her husband, who was anxious to aid his wife. Can the Court, which did not see the witnesses, nor feel the atmosphere of the Court room, take upon itself the responsibility of passing upon facts and their influence upon a Jury without seeing this witness in and by our constitutional provisions that the influence of facts are exclusively for the jury? The prosecution officer thought it was material or else he would not have insisted upon its admission; the sheriff, whose duty it 728 is to develop the evidence for the Solicitor, thought it

material or else he would not have presented himself
729 for a witness. Now, can this Court without seeing the witnesses, or hearing them testify, determine that this evidence did not influence the Jury when the able Solicitor and the chief law enforcement officer, and the able Dean of the Circuit Bench, believed this testimony material and would influence the Jury?

In view of this decision, how can a lawyer defending one accused of crime determine the admissibility of evidence? How can he judge whether it is material or not when the ablest solicitor, the chief law enforcement officer and the revered Judge rule it is material?
730 How can we determine the line of demarcation between law and facts?

By way of illustration, in Civil suit, regardless of the amount or force of evidence offered by a plaintiff, if he mentions the fact that the Defendant has insurance, the Court will, without question, grant a mistrial upon motion made by the Defendant. In that situation it is not a question of whether the greater weight of evidence is in favor of the Defendant or the Plaintiff. The only question is, Did the plaintiff men-
731 tion insurance? The Court takes judicial notice of the fact that the mentioning of insurance carried by the Defendant will probably influence the amount of the verdict. Now, in a criminal case the mere fact that the High Sheriff, who stands well with the people in Spartanburg County, testifies as to certain facts, we think the Court should take judicial notice of its probable influence. The fact that corroborated certain statements of a co-defendant would certainly lend weight. Is the mere fact that there was ample evidence upon which
732 to base a verdict to be the deciding factor in a case, or is the deciding factor to be, did this immaterial and

inadmissible evidence have any effect upon the decision of the Jury?

733 Your petitioner respectfully submits that where one is accused of a crime, the conviction of which, carries with it the odium conviction in this case carries, any evidence which might influence a Jury should be excluded, and only the Jury should pass upon its materiality.

(b) "The question for decision is whether the rights of the accused were prejudiced as claimed, by extending the session beyond six o'clock P. M.", says the Court.

734 We most respectfully submit that the Court overlooked the fact and law of the principal element of the question involved under the Second Exception, to wit: The right of the presiding Judge, not alone to extend the session, but himself, after having asked, "How about the Defendant? Are you going to put him up?", interrupt counsel, who said, "After the witness we will have here is what we had in mind. We have eliminated a lot—", and without allowing counsel to finish, to order counsel: "Put the Defendant up. *You've got an hour for that. Bring the Jury back.* Proceed."

735 Did the Defendant and his counsel have that absolute freedom guaranteed him by the authorities cited in our brief? Did not the Judge single out the defendant, even ask, "How about the Defendant?" Are you going to put him up?", and say, "Put the Defendant up. You've got an hour for that."

Our opinion is that the mere extension of the Court for an hour is discretionary; but his Honor himself singled out the Defendant and ordered him to the stand for that hour. The defendant's counsel never had the 736 opportunity to finish his statement to the Court. The

Defendant was ordered to the stand before his other
787 witnesses were heard next day and before he could consult his attorneys or his own mind as to what to do, go to the stand then, or refuse to testify, although he is not to be a witness against himself, and the solicitor cannot even comment on a Defendant's failure to take the stand. The Court did not simply say, proceed, leaving counsel and Defendant to decide in what way and what order; but ordered Defendant to the stand. Is this due process?

Respectfully submitted,

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D. W. Galloway,
John F. Williams,
C. Yates Brown,
Attorneys for the Defendant-Appellant.

STATE OF SOUTH CAROLINA
County of Spartanburg

789 Personally appeared before me W. E. Evans, who being duly sworn, says that he has read the foregoing petition, and knows of his own knowledge that the allegations made therein are true, except as to those made upon information and belief, and as to those he believes it to be true.

W. E. Evans.

Sworn to and subscribed before me this the 7th day of April, 1943.

740 C. Yates Brown (SEAL)
Notary Public for S. C.

CERTIFICATE

I, a member of the South Carolina bar, certify that 741
I have examined the record in the above-entitled case, and also the Petition for a re-hearing and in my opinion there is merit in the grounds set out in the said petition.

SAM N. BURTS.

After due consideration of the within petition, the Court is satisfied that it presents no meritorious ground for a rehearing.

Petition is therefore denied. 742

M. L. BONHAM,
Chief Justice,
D. GORDON BAKER,
E. L. FISHBURNE,
T. H. STUKES,
Associate Justices,
WM. H. GRIMBALL,
Acting Associate Justice.

May 11, 1943.

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NOTICE OF MOTION FOR BAIL

To Hon. John M. Daniel, Attorney-General of South Carolina, and the Hon. Samuel R. Watt, Solicitor Seventh Circuit:

Please Take Notice, That at 10 o'clock A. M., or as soon thereafter as counsel can be heard, the undersigned will move before the Supreme Court of South Carolina, on June 14, 1943, for an order granting bail to the defendant-appellant, William E. Evans, said motion to be made upon the records in said court, and 744
affidavit annexed hereto, said bail to be granted pend-

ing a review by the Supreme Court of the United
745 States of the issues adjudicated by this Court.

WILLIAMS & BUSBEE,
By JOHN F. WILLIAMS,
C. YATES BROWN,
Attorneys for Defendant-Appellant.

May 31, 1943.

Service accepted without prejudice to the rights of the State.

SAM R. WATT,
Solicitor Seventh Circuit.

746 June 1, 1943.

AFFIDAVIT

STATE OF SOUTH CAROLINA }
COUNTY OF AIKEN }

PERSONALLY appeared before me JOHN F. WILLIAMS, who, being duly sworn, say that the defendant, William E. Evans, has engaged his firm to seek a review by the Supreme Court of the United States
747 of the issues decided by this Court herein; and that during the present week he intends to make the preliminary arrangements looking to that end. Deponent further says that the defendant is in the State Penitentiary awaiting the outcome of such effort to bring the issues before the United States Supreme Court.

DEPONENT is further informed and believes that the defendant has arranged also with Spartanburg counsel to take part in said petition for review.

Sworn to before me this 31st day of May, 1943.
748 (SEAL) GENEVIEVE REDDICK
Notary Public for South Carolina.

JOHN F. WILLIAMS.

The Court will defer action on the within motion until such time as the Supreme Court of The United States, either assumes jurisdiction of this case, or refuses to take jurisdiction thereof. 749

D. Gordon Baker,
E. L. Fishburne,
T. H. Stukes,
Associate Justices,
E. H. Henderson,
Acting Associate Justice.

June 17, 1943.

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